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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 230.

BOSTON AND MAINE RAILROAD ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF OF APPELLANTS OPPOSING APPELLEES' MOTIONS TO AFFIRM.

Upon the grounds set forth in their Jurisdictional Statement (JS) as supplemented by this brief, appellants oppose the motions to affirm the judgment of the United States District Court for the District of Massachusetts (JS 29a), and respectfully pray that this Court deny the motions and note probable jurisdiction. The two motions to affirm—filed jointly by appellees United States of America and Interstate Commerce Commission and jointly by appellees Louisville and Nashville Railroad Company (L&N) and Atlantic Coast Line Railroad Company (ACL)—are herein termed the motions of the Government and the L&N. They were received by appellants on August 27 and 23, 1962, respectively.

Introduction.

The motions to affirm are founded on misconceptions of the nature of the questions presented for the ruling of this Court. These questions primarily involve the interpretation of provisions of Section 15(6) of the Interstate Commerce Act (JS 2-6, 12-19) and additionally present a question of due process (JS 4, 19-20). The questions of statutory interpretation involve two different provisions: one concerning relative service costs; the other, the necessity for consideration of the relative situations of individual railroads under certain circumstances. These questions of statutory interpretation include extensions of principles already declared by this Court with which the order of the Commission and the holding of the court below in sustaining that order are in conflict.

This brief will discuss these subjects in sequence.

I. The Motions Misconceive the Nature of the Questions Which Involve Relative Costs as a Factor for Commission Consideration.

The motions to affirm rest primarily on the assumption that the questions raised by this appeal are essentially based upon contentions that the Commission must give decisive weight to relative service costs in determining divisions of joint rates.

Thus, the motion of the Government at pages 4-5 states:

> "Underlying the contentions of the appellants are the assertions that of all of the several Section 15(6) standards, relative costs must be the primary or decisive factor in determining rate divisions, and that the Commission failed to give decisive weight to the alleged relatively higher system costs of the northern carriers as a group or of individual northern carrier systems."

Other statements to the same effect appear at pages 5 and 8 of the same motion.

Similarly, the motion of the L&N at page 12 asserts:

> "But the Court did not accord to appellants' cost evidence the weight appellants think should have been accorded to it. This is the essential nature of the issues appellants bring forward in their Jurisdictional Statement."

A parallel statement appears at page 17 of this motion.

Appellees' assumption in this regard is completely in error. While the Commission itself has repeatedly emphasized the primacy of relative service costs as a criterion in the determination of lawful divisions,[1] appellants do not contend that this element must be the controlling or decisive factor, nor do they question the right and function of the Commission to decide upon the weight to be given to cost data or other evidence. Accordingly, this ground for the motions fails.

The questions of statutory interpretation here raised which involve relative costs grow out of the requirement of Section 15(6) that in prescribing and determining divisions of joint rates "the Commission shall give due consideration . . . to . . . the amount of revenue required [by the carriers concerned] to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, . . ." Concerning this provision, the report of the Commission on reconsideration in *Divisions of Freight Rates*, 156 I. C. C. 94, as written by Commissioner Eastman, concludes at pages 100-101:

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1. *New England Divisions*, 66 I. C. C. 196, 199; *Divisions of Freight Rates*, 156 I. C. C. 94, 100; 203 I. C. C. 299, 335; *Southwestern-Official Divisions*, 234 I. C. C. 135, 148; *Official-Western Trunk Line Divisions*, 269 I. C. C. 765, 776; *Official-Southwestern Divisions*, 287 I. C. C. 553, 565.

> "Relative cost of service is clearly a vital factor. Section 15(6) of the interstate commerce act specifies as matters to be considered the 'amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation' and 'whether any particular participating carrier is an originating, intermediate, or delivering line,' and these plainly are matters affecting cost of service."

The amount of revenue required to pay operating expenses, taxes, and a fair return is the equivalent of full cost, since those items are the constituents of full cost. Such items as related to all traffic and the same items as related to particular traffic, represent full costs on all traffic and on the particular traffic, respectively. Such costs when comparably computed for the "respective" individual carriers or carrier groups are *relative* costs such as the Commission has regarded as of prime importance in the determination of just and equitable divisions.[2]

The motion of the Government (p. 9) and that of the L&N (pp. 6, 12) refer to the finding of the court below that the Commission gave "careful consideration to the evidence of relative costs" (JS 21a), and thereupon assume that the questions here raised concerning that subject are thereby foreclosed. But the motions wholly overlook (1) the fact—manifest on the face of its report—that the Commission, in prescribing the divisions, gave no real or genuine

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2. See cases cited in footnote 1, page 3 above.

The provision concerning "the amount of revenue required", etc., is also commonly understood as the source of the Commission's authority, in determining what the divisions should be, to take into consideration the *financial needs* of a weaker road and to give it a division larger than justice merely as between the parties would suggest in order to maintain it in effective operation as part of an adequate transportation system, provided the share left to its connections is adequate to avoid a confiscatory result. See *Baltimore & O. R. R. v. United States*, 298 U. S. 349, 370. When the record was made in the case under review none of the parties undertook to make a case of special financial need.

consideration to the only evidence of record dealing with the comparable, relative, or "respective" costs of the carriers, and (2) the further fact that the Commission's disregard of such evidence, and the action of the court below in upholding its order, necessarily stemmed directly from interpretations of Section 15(6) which appellants contend are inconsistent with the statute itself and the interpretations of it enunciated by this Court.

That this is a correct analysis is readily demonstrated by reference to certain important questions involving relative costs included within the scope of Questions 1, 2, and 3 (JS 4-5) and to the salient facts out of which they arise. For convenience, and to avoid confusion with the broader questions as phrased in the Jurisdictional Statement, those to be here discussed will be designated questions A, B, and C, respectively.

QUESTION A. COULD THE COMMISSION LAWFULLY PRESCRIBE AN INTERGROUP BASIS OF DIVISIONS AS SUCH IN ENTIRE DISREGARD OF UNCONTROVERTED GROUP COST RELATIONSHIPS?

This question arises out of the following principal facts:

(a) The complaint of the L&N and ACL asked the Commission to prescribe for joint rates on certain of their traffic, as between themselves individually and northern railroads as a group, the same intergroup basis of divisions it had previously fixed in No. 29885, *Official-Southern Divisions*, 287 I. C. C. 497; 289 I. C. C. 4. Their complaint did not include as complainants the other railroads of the southern group participating in similar joint rates between stations within Official (northern) territory.

(b) The 29885 intergroup divisions were originally fixed upon a consideration of northern and southern territorial group cost relationships for 1946 and 1948. While the northern costs were then higher, the Com-

mission, for reasons stated, assumed that for the future the costs in the two territories would be equal. *Official-Southern Divisions*, 287 I. C. C. 497, 526.

(c) Alleging that the Commission's forecast of an equality of group costs in the two territories had proved erroneous in the light of ascertained relationships in years subsequent to 1948, the northern railroads asked, and the Commission thereafter granted, reopening of No. 29885 for further hearing. (See JS 7 and fn. 3.)

(d) The Commission having denied appellants' petition of November 21, 1956 (filed November 23, 1956) for consolidation of the L&N complaint with No. 29885, northern lines presented uncontroverted evidence in the L&N case showing that northern territorial group costs had continued to increase relative to those of the southern territorial group, and now substantially exceed them. The Commission so found (JS 53a), and it is here so admitted (Paragraph VII of amended complaint, admitted in answer of U. S.-I. C. C.) (R. 31, 82).[3]

(e) Subsequent to the filing of exceptions to the Examiner's report and prior to the decision of the Commission herein, the northern railroads (appellants here), on September 28, 1959, filed their petition dated September 24, 1959, asking the Commission to consolidate the L&N case with No. 29885 for oral argument and disposition. That petition was grounded mainly on the facts that complainants (L&N and ACL) were seeking the 29885 group basis of divisions as such, and that the present conformity of that basis with statutory standards had been called in question and was then under investigation by the Commission. It was,

3. References to the record before the court below will be prefixed by "R"; except that references to the record before the Interstate Commerce Commission, which was introduced in evidence before the Court, will be prefixed by "IR"; no other pagings being presently available.

therefore, urged that it would be premature to extend the 29885 basis beyond its original scope prior to the conclusion of that investigation. In the alternative, northern lines offered to withdraw the petition if complainants would drop their request for 29885 divisions as such and agree to a decision on the basis of the instant record without reference to the former requirements in No. 29885. The Commission by its order of November 23, 1959, denied the petition (I. R. pleadings, Secretary's certificate, May 18, 1960, No. 24, pp. 10, 16 and No. 27).

(f) The Commisssion, as requested by the L&N and ACL, prescribed on their individual traffics against all northern lines as a group the 29885 group basis of divisions as such (JS 58a, 59a).

(g) In so prescribing such group basis of divisions the Commission admittedly gave no consideration to territorial group cost relationships on the ground that such costs "are not determinative of the costs of these particular movements" of the L&N and ACL traffic (JS 55a).

These circumstances raise the purely legal question whether the Commission, in prescribing an intergroup basis of divisions as such under Section 15(6), could make a valid order without giving due consideration to the uncontroverted evidence of relative costs bearing upon the cost relationships of the groups.

QUESTION B. COULD THE COMMISSION, CONSISTENTLY WITH THE REQUIREMENTS OF SECTION 15(6) AS INTERPRETED BY THIS COURT, LAWFULLY PRESCRIBE DIVISIONS OF JOINT RATES ON PARTICULAR TRAFFIC IN COMPLETE DISREGARD OF RELATIVE COSTS ON ALL TRAFFIC?

The principal facts out of which this question arises are as follows:

(a) Since the L&N and ACL were asking for the 29885 intergroup basis of divisions for application to

their individual traffics with the northern railroad group, northern defendants applied the appropriate territorial group costs to these respective traffics. These applications developed that the L&N and ACL proportions of total revenue under existing divisions were not less than their proportions of total costs (JS 51a-52a).

(b) Individual northern lines also adduced relative costs for their own lines and the L&N on traffic which concerned only themselves and that carrier, computed from their respective system costs. This showed that the L&N proportions of total revenue in each instance were not less than its proportion of the total costs (JS 52a-53a).

(c) The 29885 basis of divisions would produce for the L&N and ACL proportions of total revenue far greater and for northern railroads far less, than their proportions of total costs computed under either the territorial or system cost bases as above described. (Paragraph XI of amended complaint, admitted in answer of U. S.-I. C. C.) (R. 34, 82)

(d) The order of the Commission fixed the 29885 bases of inter-group divisions for the traffics of the L&N and ACL individually against all northern lines as a group and without reference to the showing of individual northern lines as against the L&N.

(e) In prescribing such divisions the Commission admittedly gave no consideration to relative costs computed on a territorial group or individual railroad system basis on the ground that such costs "are not determinative of the costs of these particular movements" (JS 55a).

The territorial group and individual carrier system costs used in northern lines' comparisons were derived from the handling of *all traffic* by the carriers as a group or individually. Viewing such costs as relative costs on all

group or system traffic—as the Commission evidently did—the question arises whether, under the requirements of Section 15(6) the Commission was at liberty to disregard such admittedly relative costs on all traffic in the prescription of divisions on the particular traffic.

This question would seem to be answered in principle, if not in terms, by the decision of this Court in *Baltimore & O. R. R. v. United States*, 298 U. S. 349. There the Court was concerned with the very language of Section 15(6) here involved—"the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation"—and with the contention of northern lines that the Commission erroneously "considered rates of return from the carriers' entire operations on all their railroad property instead of fair return from transportation of citrus fruit on the use fairly attributable to that service." In disallowing that contention the Court at page 360 held:

> "Their contention assumes and depends upon a construction of the quoted clause that would limit consideration of the return to services covered by the divisions under consideration and prohibit taking into account returns from all service. But that is not the meaning of the clause. The language, 'property held for and used in the service of transportation', is broad enough to include all carrier property. It requires no discussion to demonstrate that Section 15(6) authorizes the commission to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property. And unquestionably the paragraph also empowers the commission to take into account the revenues, expenses, taxes and returns attributable to the service covered by the divisions under consideration."

While the Court was there dealing specifically with rate of return for all traffic as well as for the particular traffic, it is apparent that the broad construction given the provision includes as well the items of operating expenses and taxes for all traffic as well as for particular traffic, which, with a fair return, constitute full costs on all traffic and on particular traffic, respectively.

It therefore appears that, under the "due consideration" requirement of Section 15(6) the Commission was under a direct mandate to give a real and genuine consideration to relative ("respective") costs on *all traffic* as well as on the particular traffic and was not at liberty to disregard the territorial or system cost results, as it did, because it deemed them to be "not determinative of the costs of these particular movements."

Because of the similarity in the statutory standards for administrative action, the decisions of this Court in *Western Air Lines v. C. A. B.*, 347 U. S. 67, and *Delta Air Lines v. Summerfield*, 347 U. S. 74, support the principle for which *Baltimore & O. R. R. v. United States*, 298 U. S. 349, is here cited. In those cases this Court held that neither the views of the Board or the court below concerning desirable policy or statutory requirements could supersede the mandate of the statute "that the Board 'shall take into consideration' what 'the need' of the carrier is." *Delta Air Lines v. Summerfield*, 347 U. S. 74, 78. That "need", as held at page 79 of the same case, "is measured by the entirety of its operations, not by the losses of one division or department."

Accordingly, appellants submit that the conclusion of the Commission and the holding of the court below, that the Commission complied with the statute in its treatment of the admittedly comparable and uncontroverted territorial and system costs as applied to the traffics of the complainants, are contrary to the mandate of the empowering statute under the principle announced by this Court in *Baltimore & O. R. R. v. United States*, 298 U. S. 349, 360.

QUESTION C. IN FIXING DIVISIONS ON PARTICULAR TRAFFIC COULD THE COMMISSION LAWFULLY DISREGARD THE ONLY RELATIVE COSTS ON THAT TRAFFIC?

This question arises from the following principal facts:

(a) Under the cost formula developed by the Commission's Cost Section, employed by northern lines in this case (JS 51a-53a), territorial group or individual railroad system unit costs derived from all traffic, when applied to particular traffic, develop relative costs for the particular traffic. Cf. *Official-Southwestern Divisions*, 287 I. C. C. 553, 566-568.

(b) Northern lines presented such relative costs of the particular traffics of the L&N and ACL individually as against northern lines as a group and of the individual traffics of the L&N with individual northern lines which concerned only themselves. This evidence was uncontroverted and showed proportions of total costs for the L&N and ACL not in excess of their proportions of total revenue under existing divisions (JS 51a-53a). Also under the 29885 divisions the L&N and ACL would obtain proportions of total revenue far greater, and northern lines proportions far less, than their proportions of such total costs. (Paragraph XI of Amended Complaint, admitted by answer of U. S.-I. C. C.) (R. 34, 82.)

(c) On the important Automobile Parts traffic originated by the Detroit, Toledo & Ironton (DT&I) in the Detroit area and delivered by the L&N at Louisville —which constitutes about 20 percent of the L&N traffic involved—the DT&I presented a more particularized study of relative service costs, based on the system costs of the railroads concerned but adjusted to reflect the special terminal costs of record in the Detroit area and at Louisville and also other items of corresponding nature. (IR Exhibit 126.) This disclosed a propor-

tion of total costs for the L&N not exceeding its proportion of total revenue on the Automobile Parts traffic under existing divisions. This evidence was not controverted by any cost evidence.

(d) Neither the L&N or ACL presented any cost evidence for themselves and northern railroads, as a group or individually, of a comparable or relative character despite the statutory specification of "the amount of revenue required to pay their *respective* operating expenses, taxes, and a fair return . . ." (Italics inserted.)

(e) The Commission, in fixing the 29885 group divisions for application to these particular traffics, completely disregarded all evidence of record of admittedly comparable, relative, or "respective" costs on the ground that they were "not determinative of the costs of these particular movements". (JS 55a)

This factual situation raises the purely legal question whether, in prescribing divisions of joint rates on particular traffic under Section 15(6), the Commission is at liberty to disregard—as it did—the only, and uncontroverted, evidence of record bearing on the relative or "respective" costs to the carriers concerned in the handling of that particular traffic.

Appellants make no assumption as to what the Commission's order would have been had it given due consideration to the uncontroverted evidence of relative costs as described under questions A, B, and C, above. But if, as they contend, it was the duty of the Commission to accord that evidence such consideration and to make consistent findings as to the reasons for its conclusions, its present order cannot stand. Cf. *Secretary of Agriculture v. United States*, 347 U. S. 645, 652-654.

II. The Motions Misconceive the Questions Involving the Typical Evidence Principle of the Beaumont Case.

The motions of appellees misconceive the point of appellants' questions 4 and 5 (JS 5-6, 16-19) relating to the typical evidence principle in Section 15(6) cases as announced by this Court in *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 82, and, as a consequence, their comments are not pertinent.

Thus, the motion of the Government (p. 10) assumes that appellants attack the order on the ground that the Commission did not fix separate divisions or subdivisions for *each* northern railroad. The motion of the L&N (p. 15) suggests that appellants challenge (i) the power of the Commission to fix divisions "upon the complaint of only two railroads of one group", and (ii) the sufficiency of the record to permit "the prescription of a group basis of divisions for northern lines."

These assumptions miss the point of appellants' questions 4 and 5 (JS 5-6).

In essence Questions 4 and 5 challenge the power of the Commission to prescribe an intergroup basis of divisions—found reasonable by it as between individual complainants and all defendants as a group—for application to traffic in which only an individual complainant and an individual defendant participate, under the following combination of circumstances:

> (1) The joint rates involved are of intraterritorial character and have never been subject to an inter-group basis of divisions;
>
> (2) The individual defendant railroad made a separate defense of its divisions with the individual complainant and asked separate findings with respect thereto;
>
> (3) The Commission made no findings of similarity or typicality of conditions as between all de-

fendants as a group and the individual defendant making such separate defense; and

(4) The Commission made no findings—in the terms of Section 15(6)—that the existing divisions will be unjust, etc., "as between the carriers parties thereto" and that the divisions prescribed will be the just, etc., divisions "to be received by the several carriers".

Appellants' reasons for contending that under this combination of circumstances—which here obtains—the Commission's order, as respects the traffic of such individual complainant and defendant, was an invalid exercise of its authority under Section 15(6), within the principle of the Court's interpretation in *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 82-83, are sufficiently set forth at pages 16-19 of the Jurisdictional Statement and need no repetition here.

III. The Due Process Point Is Not Foreclosed.

The motion of the Government (p. 10), with apparent reference to appellants' due process point (JS 4, 19-20), cites the conclusions of the court below (JS 23a, 24a) that such ultimate findings as the Commission made concerning similarity of conditions in No. 29885 and the instant case were supported by substantial evidence. Presumably the L&N motion (p. 8) relies upon a similar conclusion of the District Court (JS 28a).

Except for the superficial similarity depicted in the sketch at page 5 of the L&N motion and the mere rate comparisons contained in exhibits of the L&N and ACL, the specific facts of record—regarding conditions bearing upon the propriety of requiring the 29885 divisions in the instant case—which were found by the Commission are inconsistent with its ultimate conclusions of similarity. This is true of the Commission's findings concerning the important factor of relative group costs as contrasted with its admittedly

erroneous estimate of them in No. 29885 (JS 53a; paragraph VII of amended complaint, admitted in answer of U. S.-I. C. C., R. 31, 82), its findings concerning relative average hauls and relative circuity of actual hauls as compared with short-line distances (to which the 29885 factors are applied) (JS 47a), and its findings concerning relative volume of movements under the 29885 divisions and under those here ordered (JS 48a).

Further, the conclusion of the court below that "It was perfectly proper for the Commission to compare the records in the two dockets" can not be controlling here, since neither the record in No. 29885 nor any portions of it were introduced, designated, or identified in the record in the instant case. Further, the report of the Commission herein does not identify in any way the facts or findings therein on which it based its present decision. But assuming all the facts and findings stated in the several reports of the Commission in No. 29885 were properly officially noticed, none would support the Commission's general statements on the subject of similarity of conditions in the two proceedings nor the conclusion of the court below with reference to record support therefor.

The very ground upon which the Government (including the Commission) undertakes to support its motion emphasizes the basic failure of the Commission to accord northern railroads the essentials of due process. At page 4 of its motion the Government represents the order as establishing—in connection with the prior orders in No. 29885—"a uniform basis for the division of joint rates on *all* interterritorial and *border point traffic.*" (Italics inserted.) Thus, although the other railroads of the southern group concerned in similar rates were not parties to the L&N complaint, the order is here sought to be justified on the theory that the Commission was fixing or extending an *intergroup* basis of divisions. Yet despite this admission of the underlying basis for its order, the Commission, as made plain in its report, gave no real or genuine considera-

tion to the uncontroverted relative group costs on the ground that they were not determinative of the costs on the *particular movements* of the L&N and ACL traffic (JS 55a).

It would seem that due process would contemplate a decision on the facts of record bearing upon the issues as framed or as regarded by the Commission as crucial. Here, to meet the request of the two individual southern railroads, complainants, for an intergroup basis of divisions, northern lines presented uncontroverted evidence of relative costs both for the carrier groups and for individual lines. But despite its repeated recognition of the primacy of such evidence in divisions cases, the Commission gave no real or genuine consideration either to the group costs or the individual lines' costs in determining the divisions prescribed.

Further on this subject reference is respectfully made to the Jurisdictional Statement, pages 4 (Question 1), 9-10, 19-20.

IV. The L&N Motion Errs in Its Summary of the Questions Presented.

The L&N motion at page 7, characterizes as "appellants' summary of the essential nature of the questions presented" the issue stated under point IV of the Jurisdictional Statement on substantiality (JS 20-21). This reads:

> "Taken together, the questions presented by this appeal raise the eminently substantial issue whether, consistently with its statutory duty and administrative function, the Commission, in prescribing divisions of joint rates, may lawfully base its action solely upon its former conclusions on another and earlier record in another case involving other joint rates, in complete disregard of the substantially different current conditions disclosed by the later record before it."

This is not appellants' summary of the questions here raised nor of their essential nature. Rather it is an additional issue which arises from those presented (JS 4-6).

It is of the essence of the administrative function that determinations of a regulatory agency should reflect changing facts and conditions. Where, as here, the agency wholly disregards uncontroverted evidence of important factual conditions substantially different from those underlying its earlier determination made upon another record in another case, its unquestioning and *unexplained* acceptance of its earlier determination as a precedent for later action represents a failure to fulfill its basic function which should not escape the condemnation of this Court.

V. Supplemental Statement on Substantiality of the Questions.

The substantiality of the questions raised by this appeal is indicated at pages 12-21 of the Jurisdictional Statement, to which reference is prayed. Only a few additional matters need here be noted.

Considering the relative cost aspects of Section 15(6) Questions A and C stated above [4] are novel, and the same may be said of Question B [5] unless deemed by this Court to be ruled by the principle of *Baltimore & O. R. R. v. United States*, 298 U. S. 349, 360, as appellants contend.

As concerns the relation of the principle of the ruling of this Court in *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 82-83, to Questions 4 and 5 (JS 5-6), either the principle of that ruling applies, as contended by appellants, or this Court should now declare the applicable rule.

The instant case is a particularly appropriate one for the Court's setting these several questions at rest. While the court below described the present record as "massive" (JS 21a), the record is a small one as divisions cases frequently go. Further, the more significant evidence, particularly that of relative costs, is here uncontroverted. This permits the legal questions to stand in clearer perspective.

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4. *V. supra*, pages 5 and 11, respectively.
5. *V. supra*, p. 7.

It is now a matter of many years since this Court has given consideration to the proper interpretation of Section 15(6) in its broader aspects[7] and in view of the present-day importance of divisions litigation to the railroads of the Nation, and to the Commission itself, the resolution of these various questions by this Court on this appeal would be most timely and helpful.

CONCLUSION.

For the reasons set forth in the Jurisdictional Statement and in the foregoing brief, appellants most respectfully ask that the motions to affirm filed by the United States and Interstate Commerce Commission and by the Louisville & Nashville and Atlantic Coast Line railroads be denied and that this Court note probable jurisdiction of the matter so that the case can be fully briefed and argued.

Respectfully submitted,

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7. Such few divisions cases as have had the attention of this Court subsequent to *Baltimore & O. R. R. v. United States*, 298 U. S. 349 (1936) have not required interpretation of Section 15(6). Cf. *I. C. C. v. Hoboken R. Co.*, 320 U. S. 368 (1943); *United States v. Great No. Ry.*, 343 U. S. 562 (1952).

PROOF OF SERVICE.

I, Joseph F. Eshelman, one of the attorneys for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of September, 1962, I served the foregoing Brief of Appellants Opposing Appellees' Motions to Affirm on each adverse party by depositing in a United States mailbox a copy thereof, with first-class postage prepaid, duly addressed to counsel of record for each such party at his post office address, as follows:

1. On Appellee the United States of America, by mailing by regular-mail copies to the Honorable Archibald Cox, the Solicitor General, Lee Loevinger, Esq., Assistant Attorney General, and Robert B. Hummel, Esq., Elliott H. Moyer, Esq., and Isaac Daniel Stewart, Esq., Attorneys, Department of Justice, Washington 25, D. C., and a copy each to W. Arthur Garrity, Esq., United States Attorney, and Paul J. Redmond, Esq., Assistant United States Attorney, both at the Federal Building, Boston, Massachusetts.

2. On Appellee the Interstate Commerce Commission, by mailing by regular mail a copy to Robert W. Ginnane, Esq., its General Counsel, at the Interstate Commerce Commission, Washington 25, D. C.

3. On Appellees Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, by mailing by air mail copies to each of their attorneys, R. Wray Henriott, Esq., W. L. Grubbs, Esq., and Joseph L. Lethihan, Esq., all at 908 West Broadway, Louisville 2, Kentucky; and by mailing by regular mail a copy thereof to their attorney, James D. St. Clair, Esq., 60 State Street, Boston 9, Massachusetts.

Dated at Philadelphia, Pennsylvania, this 14th day of September, 1962.

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